184 (3)

No. 10-1053

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

ISOLINA PICON,

Petitioner,

v.

PETER A. BENSON, COUNTY OF SAN MATEO, ROBERT FOUCRAULT, et al.,

Respondents.

On Petition For Writ of Certiorari To The California Court of Appeals

REPLY IN SUPPORT OF WRIT OF CERTIORARI

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I. THE OPINION REACHED BY THE CALIFORNIA COURT OF APPEALS DOES NOT REST ON "ADEQUATE AND INDEPENDENT" STATE GROUNDS

The issue is whether the precedent setting opinion issued by the California Court of Appeals rests on "adequate and independent" grounds where the method of statutory interpretation combined two California statues, did not follow *de novo* review, altered the plain language *and* ignored the legislative history of the existing statutes. This court has held:

> The adequate and independent state ground doctrine states that when a litigant petitions the U.S. Supreme Court to review the judgment of a state court which rests upon both federal and non-federal (state) law, the U.S. Supreme Court does not have jurisdiction over the case if the state ground is (1) "adequate" to support the judgment, and (2) "independent" of federal law. *See Michigan v. Long*, 463 U.S. 1032, 1038 (1983) (It is, of course, incumbent upon this Court to ascertain for itself whether the asserted non-federal ground independently and adequately supports the judgment. (internal quotation marks omitted)); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

I. THE OPINION REACHED BY THE CALIFORNIA COURT OF APPEALS DOES NOT REST ON "ADEQUATE AND INDEPENDENT" STATE GROUNDS

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Here the method of statutory interpretation employed by the California Court of Appeals in this precedent setting decision was arbitrary, unforseen, and deprived the Petitioner of her constitutionally protected rights of due process, therefore, it was not "adequate." Additionally, the opinion does not contain a plain statement that the decision was based "independently" on state law. Conversely, the opinion nearly quotes verbatim the opinion issued by the United States District Court for the Northern District of California, which dismissed with prejudice the Petitioner's Fourteenth Amendment claim of damages under 42 U.S.C. § 1983 on July 10, 2008. [Resp. App. 12a] Whereas here the record clearly reflects the fact that the judgment entered by the California Court of Appeals used federal law to guide their application of state law and, to provide the actual basis for the decision that was reached, this court is required to reach the case on the merits. *Texas* v. *Brown*, 460 U. S. 730, 732-733, n. 1 (1983) (plurality opinion). Cf. *South Dakota* v. *Neville*, 459 U. S. 553, 569 (1983) (STEVENS, J., dissenting)

A. The Holding in the Above Referenced Case is Not "Adequate"

The issue is whether the California Court of Appeals employed a method of statutory interpretation that was arbitrary, unforseen, and deprived the Petitioner her constitutionally protected right to vindicate her claims of wrongdoing or imposed an undue burden on her ability to protect her rights. This court has held:

> The "adequacy" prong primarily focuses on state court dismissals of federal claims on state procedural grounds, as procedural requirements are by definition logically antecedent. Antecedent state-law grounds (i.e., state rules of procedure) are adequate to support a judgment unless they (1) are arbitrary, unforeseen, or otherwise deprive the litigant of a reasonable opportunity to be heard, *Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958), or (2) impose an undue burden on the ability of litigants to protect their federal rights, *Felder v. Casey*, 487 U.S. 131, 138 (1988).

Here it is obvious that the judment was not "adequate." Since the Petitioner relied on the plain language and legislative history of California Government Code Sections 27491 and 27491.45 when drafting her complaint, the opinion issued by the California Court of Appeals extinguished the Petitioner's rights to vindicate her claims without notice which is a denial of post deprivation due process. Further, combining two statutes, not following *de novo* review, *and* ignoring the plain language and legislative history of the the two statutes was an arbitrary, unforseen act by the judiciary that deprived the Petitioner of due process and imposed an undue burden on the Petitioner to defend against the peremptory writs.

California Government Code Section 27491 reads:

> Authority to take possession of body in sudden infant death syndrome; Exhumation; Medical findings; Retention of tissues; Right to attend coroner's autopsy; Effect of Uniform Anatomical Gift Act upon performance of autopsy.
>
> (a) For purposes of inquiry the coroner shall, within 24 hours or as soon as feasible thereafter, where the suspected cause of death is sudden infant death syndrome and, in all other cases, the coroner may, in his or her discretion, take possession of the body, which shall include the authority to exhume the body, order it removed to a convenient place, and make or cause to be made a post-mortem examination or autopsy thereon, and make or cause to be made an analysis of the stomach, stomach contents, blood, organs, fluids, or tissues of the body. The detailed medical findings resulting from an inspection of the body or autopsy by an examining physician shall be either reduced to writing or permanently preserved on recording discs or other similar recording media, shall include all positive and negative findings pertinent to establishing the cause of death in accordance with medicolegal practice and

this, along with the written opinions and conclusions of the examining physician, shall be included in the coroner's record of the death. The coroner shall have the right to retain only those tissues of the body removed at the time of the autopsy as may, in his or her opinion, be necessary or advisable to the inquiry into the case, or for the verification of his or her findings. No person may be present during the performance of a coroner's autopsy without the express consent of the coroner.

(b) In any case in which the coroner knows, or has reason to believe, that the deceased has made valid provision for the disposition of his or her body or a part or parts thereof for medical or scientific purposes in accordance with Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety Code, the coroner shall neither perform nor authorize any other person to perform an autopsy on the body unless the coroner has contacted or attempted to contact the physician last in attendance to the deceased. If the physician cannot be contacted, the coroner shall then notify or attempt to notify one of the following of the need for an autopsy to determine the cause of death: (1) the surviving spouse; (2) a surviving child or parent; (3) a

> surviving brother or sister; (4) any other kin or person who has acquired the right to control the disposition of the remains. Following a period of 24 hours after attempting to contact the physician last in attendance and notifying or attempting to notify one of the responsible parties listed above, the coroner may perform or authorize the performance of an autopsy, as otherwise authorized or required by law.
>
> (c) Nothing in this section shall be deemed to prohibit the discretion of the coroner to conduct autopsies upon any victim of sudden, unexpected, or unexplained death or any death known or suspected of resulting from an accident, suicide, or apparent criminal means, or other death, as described in Section 27491.

California Government Code Section 27491.45 reads:

> Retention of tissues removed at autopsy; Removal of parts for transplant, or therapeutic, or scientific purposes
>
> (a)(1) The coroner shall have the right to retain parts of the body, as defined in subdivision (g) of Section 7150.1 of the Health and Safety Code, removed at the time of autopsy or acquired during a

coroner's investigation as may, in the opinion of the coroner, be necessary or advisable for scientific investigation and training. The coroner may employ or use outside laboratories, hospitals, or research institutions in the conduct of the coroner's scientific investigation or training.

(2) Parts of the body retained pursuant to paragraph (1) may be released by the coroner to hospitals, medical educational research institutions, and law enforcement agencies for noncoroner training, educational, and research purposes, either upon consent of the decedent or other person, as specified in Section 7151 of the Health and Safety Code, or after a reasonable effort has been made to locate and inform persons listed in subdivision (a) of Section 7151 of the Health and Safety Code of their option to consent or object to the release, and the appropriate person consents or that effort has been unsuccessful. A reasonable effort shall be deemed to have been made when a search for the persons has been underway for at least 12 hours. The search shall include a check of local police missing persons records, examination of personal effects, and the questioning of any persons visiting the decedent before his or her death or in the hospital, accompanying

the decedent's body, or reporting the death, in order to obtain information that might lead to the location of any persons listed in subdivision (a) of Section 7151 of the Health and Safety Code.

(b) The coroner may, in his or her discretion, allow removal of parts of the body by a licensed physician and surgeon or trained transplant technician for transplant, or therapeutic, or scientific purposes pursuant to Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety Code, **only if the following conditions are met:**

(1) The provision of the part will not unnecessarily mutilate the body or interfere with the autopsy.

(2) The decedent or other person, as specified in Section 7151 of the Health and Safety Code, has consented to the provision of the part, as prescribed by Section 7154 of the Health and Safety Code, or after a reasonable effort has been made to locate and inform persons listed in subdivision (a) of Section 7151 of the Health and Safety Code of their option to consent or object to the release, and the appropriate person consents, or that effort has been unsuccessful. A

reasonable effort shall be deemed to have been made when a search for the persons has been underway for at least 12 hours. The search shall include a check of local police missing persons records, examination of personal effects, and the questioning of any persons visiting the decedent before his or her death or in the hospital, accompanying the decedent's body, or reporting the death, in order to obtain information that might lead to the location of any persons listed in subdivision (a) of Section 7151 of the Health and Safety Code. In obtaining this gift, the coroner shall notify the donor of the specific part or parts requested and shall obtain the donor's informed consent, as provided in Section 7150.5 or 7151 of the Health and Safety Code.

(c) Nothing in this section shall be construed as limiting any right provided for in Section 7152 of the Health and Safety Code.

(d) For purposes of this section, "trained transplant technician" means a person who has completed training in tissue removal for transplant or therapeutic, or scientific purposes, which the coroner determines to be adequate for the purposes.

It is evident that combining the two statutes invalidates the state procedural requirements regarding retention of entire organs for scientific purposes without the express consent of the next of kin. Furthermore California Government Code Section 27491.45 (b)(2), unequivocally states that the coroner may allow a licensed physician and surgeon such as the Respondent Dr. Benson to remove and retain entire organs for scientific purposes *only* if the the next of kin has consented which demonstrates the statutory limitation and distinction between the coroner and the physician. This is the crux of the Petitioner's complaint in which she has maintained that her protected property rights to determine the disposition of the remains of her deceased son were violated when the Respondent Coroner Robert Foucrault allowed the removal and retention of the entire heart organ by the Respondent Dr. Benson without her knowledge and consent. Thus when the California Court of Appeals held:

> Given the coroner's duties and the realities involved in performing those duties, we disagree with Picon that the Legislature literally meant only the person occupying the office of coroner can make the decision to retain parts of the body removed at autopsy. Instead we hold a physician employed by the coroner may make that decision. [Petn. App. 13]

The opinion directly and irrefutably contradicts the plain language of the applicable

statutes, which was an arbitrary, unforeseen act by the judiciary that denied the Petitioner her constitutionally protected rights of due process. Furthermore, when the California Court of Appeals held:

> The problem for Picon, of course, is that while section 27491.4 **might not expressly provide for retention of organs**, section **27491.45** does. That section specifically permits the retention of parts of the body removed at the time of an autopsy to study them. Picon alleges Dr. Benson retained her son's heart because he was intrigued by the rarity of the heart condition he had discovered. In other words, he wanted to study it. There is no hint or suggestion that Dr. Benson retained the heart for some depraved or repugnant purpose. Instead he allegedly sought to satisfy his or a colleague's scientific curiosity regarding the heart condition. **Only if that scientific curiosity** had led to the release of the heart to a third party for noncoroner research purposes would consent from the next of kin have been required. [Petn. App. 14-15] Ironically, the only reason for the distinction between the tissues and organs is relevant here is because defendants insist the sole reason they retained Nicholas Picon's heart was to investigate cause of death. Thus it is the

> defendants themselves who invoke section 27491.4 as authority for the discretion to retain an organ to determine cause of death. [Petn. App. 15]

The court simply ignored the fact that the two statutes authorize the coroner to do two separate and distinctive functions: autopsies versus transplants and scientific research. By combining the two statutes and holding that there is no duty on behalf of the coroner/independent contractor doctor to obtain consent before removing and retaining body parts, the laws have been completely rewritten and, if a person dies in California under conditions that warrant an autopsy, their next of kin no longer have any right to be notified/provide consent if the body parts are removed and retained to determine cause of death, or scientific investigation or coroner training. [Petn. App. 2]

Review is warranted by this Court to reach a decision on the merits of the facts of this case so that widespread abuse and zero accountability does not occur in California or amongst other states that may choose to follow California on the issue of organ retention. Without any procedural requirements in place to safeguard against improper removal and retention of organs, illegal trafficking by independent contractors after autopsy will likely result.

In fact, the ever-increasing worldwide demand for organs highlights the issues of the potential for illegal trafficking and monetary gain of individuals

seeking to exploit this new loophole in the law. A state law that allows for the retention of entire human organs by independent contractors for "scientific purposes" without consent, notification or fear of reprisal beckons widespread abuse. Anything can be construed as being for a "scientific purpose."

Furthermore, now that the judiciary has arbitrarily decided to elevate independent contractors to equivalent status as the coroner, an elected official that has a duty to the public when deciding to retain entire organs, the office of the coroner and the duties that are associated with it have been marginalized without the legislative branch of government making that decision.

By holding that no duty is violated when material facts exist suggesting that the retention of the entire organ went beyond the determination into the cause of death, the applicable statutes have been rendered meaningless and the opinion is arbitrary, unforeseen and deprives the Petitioner the right to vindicate her claims of wrongdoing. Also, by arbitrarily altering the plain meaning of the applicable statutes, the judiciary has placed an undue burden on the Petitioner to vindicate her claims of wrongdoing. The result is that the judgment is not "adequate" as defined by the "adequate and independent" doctrine.

B. The Holding in the Above Referenced Case is Not "Independent"

The issue is that the judgment entered by the California Court of Appeals relied on the dismissal of the Petitioner's Fourteenth Amendment claims by the Federal District Court when rendering its decision. This court has held:

> The "independence" prong focuses on decisions where the state and federal rules are not clearly distinct. If it is not "apparent from the four corners" of the opinion that the judgment rests on an independent state law rule, then, unless it is "necessary or desirable" to obtain clarification from the state court itself, the Supreme Court will presume that the decision rested in part on federal law, thereby rendering it reviewable. *Michigan v. Long*, 463 U.S. 1032, 1040 & n.6. Furthermore, when federal law limits the states' ability to change the definition of state-created legal interests, the Supreme Court has jurisdiction to review the state court's characterization of the law both before and after the change. For example, the U.S. Supreme Court routinely reviews state court determinations of state property law to determine whether a litigant has been deprived of "property" within the meaning of the Due Process clause.

Review is warranted where the California Court of Appeals stated:

> Even if we credit Picon's more plausible factual allegations -- that Dr. Benson retained the heart to study it and that he intended to send it to Stanford University for research -- defendants would still be entitled to judgment in their favor. The law did not impose a duty on defendants to obtain Picon's consent unless and until they acted to send the heart to Stanford University for noncoroner purposes. [Petn. App. 21]

Here, it is evident that the California Court of Appeals referenced the decision reached by the federal court and used it to guide their application of state law to provide the basis for the decision that was reached which deprived the Petitioner Federal Due Process afforded to her by the U.S. Constiution. On July 10, 2008 the Federal Court stated:

> Even Plaintiff's allegation that the Coroner had transferred the heart to Stanford for study does not trigger a notice obligation, as California Government Code section 27491.45(a)(1) authorizes him to "employ or use outside laboratories, hospitals, or research instituions in the conduct of the coroner's scientific investigation or training." [Resp. App. 10a]

Since it is obvious that the California Court of Appeals relied on the federal court's interpretation of California law when it renedered its opinion denying the Petitioner post deprivation Due Process afforded to her under the Fourteenth Amendment of the United States Constitution, this Court has jurisdiction to determine whether the state property law has violated the due process clause. Based on the simple fact that California Government Code Sections 27491.4 and 27491.45 read in their entirety confer a protected property interest to the next of kin for determination of the disposition of the remains of a deceased person at death.

Since the California Court of Appeals based their application of state law on the holding of the federal court and the actual basis for the decision that was reached rested upon federal grounds, this Court is required to reach the merits. This Court held in *Oregon* v. *Kennedy,* 456 U. S. 667, 670-671 (1982):

> [e]ven if the case admitted of more doubt as to whether federal and state grounds for decision were intermixed, the fact that the state court relied to the extent it did on federal grounds requires us to reach the merits. *Id.*, at 671.

Thus, this court has the jurisdiction to review this case on the merits.

II. THE LEGISLATURES OF THE STATE OF CALIFORNIA CONFERRED A PROPERTY INTEREST TO THE NEXT OF KIN OF ENTITLEMENT TO CONTROL THE DISPOSITION OF THE REMAINS OF A DECEASED PERSON

The issue is whether California law and existing understandings or rules established a protected property interest in the disposition of the remains of deceased persons. The United States Constitution protects rather than creates property interests once conferred.

> In *Gonzalez-De-Blasimi v. Family Dept.* 377 F.3d 81,86 (1st Cir. 2004), with regard to the plaintiff's procedural due process claim, the court noted that under the Fourteenth Amendment the Constitution does not create property interests. Instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. In order to establish a constitutionally protected property interest, a plaintiff must demonstrate that he or she has a legally recognized expectation that he or she will retain his or her position. *Id.* at 86.

Prior to the precedent setting opinion issued in this case Californians had an expectation that if they or their loved ones died under circumstances that warranted an autopsy and were not as a result of an ongoing criminal investigation they had a quasi-property right to determine the disposition of the remains of their loved ones. This right was established in California in 1899, when the CA Supreme Court held that the duty of the next of kin to bury the deceased required recognition of exclusive rights of possession, control and disposition vesting in those with the duty. *O'Donnell v. Slack* (1899) 123 Cal. 285, 55 P. 906,907.

These rights, it explained, were by law "protected, and for a violation of which [next of kin] are entitled to indemnification." *Id.* One year later, in *Enos v. Snyder* (1900) 131 Cal. 68, 63 P. 170, the California Supreme Court upheld the interests of the next of kin in relation to dead bodies. The California Supreme Court resolved the issue of the possessory right of the body of the deceased for purposes of burial in favor of the next of kin. Most courts addressing the subject have modified the explanation that "there is no property in a dead body." Following *O' Donnell*, California courts commonly use the term "quasi property" to describe the rights of next of kin to the body of the deceased. Violation of the correlative duty of others to refrain from disturbing the body is subject to an action for "tortuous interference with the right to dispose of a decedent's remains." *Sinai Temple v. Kaplan* (1976) 54 Cal.App.

3d 1103; *Christensen v. Superior Court* (1991) 54 Cal.3d 868.

In 1968, the National Conference of Commissioners on Uniform Laws approved the Uniform Anatomical Gift Act (UAGA), adopted by California the same year, which grants next of kin the right to transfer the parts of bodies in their possession to others for medical or research purposes in accordance with Chapter 3.5 (commencing with § 7150) of Part 1 of Division 7 of the California Health & Safety Code. With California's adoption of the 1987 version of the UAGA and California Health and Safety Code § 7150, it statutorily recognized other important rights of the next of kin in relation to the bodies of their deceased loved ones: "the right to transfer body parts and *refuse to allow their transfer*." *Newman v. Sathyavaglswaran* (2002) 287 F. 3d 786.

With the holding in *Huntley v. Zurich General Accident & Liability Insurance Co.* (1929) 100 Cal.App 201, and the 1961 enactment of California Gov Code Section 27491.4, California conferred authorization judicial in nature in the office of the coroner. This authority once conferred created a paramount right to custody, including the right to conduct an autopsy by the coroner in order to determine the cause of death. With the authority came obligations to carry out the duty according to specific procedural safeguards. However, once the coroner completes the autopsy or investigation, the right to control disposition of the remains of a deceased and the duty of interment devolve on the

family of the deceased. *People v. Vick* (1970) 11 Cal.App.3d 1066; Health and Safety Code Section 7100.

The Respondents violated these property rights when the San Mateo County Coroner without authorization allowed the independent contractor to remove and retain entire organs for scientific purposes without the express consent of the next of kin which denied them their legally cognizable right to determine the disposition of the remains of their loved ones.

Therefore, the Petitioner's legally cognizable property right to determine the disposition of the remains of her son for purposes of burial were violated by the Respondent Dr. Benson when he stated:

> Mr. Marriscolo was the chief deputy coroner with whom I had daily contact. And I'm quite sure that I stated to him that it was my wish to send the Picon heart to Stanford University for academic and university workup. *See* Benson Depo. Vol. II, transcript pg. 404 lines 7-11. Separate Statement of Disputed Issues Summary Judgment motions.

Thus, the Fourteenth Amendment Due Process clause was triggered when the Respondents acted to deprive the Petitioner pre and post deprivation due process and this court has jurisdiction to review the facts of this case on the merits.

III. THE SUPREME COURT OF CALIFORNIA ACTED TO FINALLY DEPRIVE THE PETITIONER OF PROPERTY WITHOUT A HEARING IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

The issue is whether the method of statutory interpretation employed by the California Court of Appeals in its precedent setting opinion provided the Petitioner with procedural due process. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

Here it is evident that the method of statutory interpretation employed by the California Court of Appeals did not provide the Petitioner with the requisite notice to vindicate her claims of wrongdoing. First, the opinion combines two

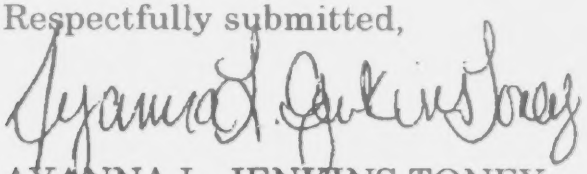
statutes that cannot logically be read together in their entirety, because subdivision b) in both statutes would be invalidated as a result. Secondly, the opinion completely ignores the plain meaning of the statutes and literally rewrites the law. By elevating the independent contractor doctor to the same status as the elected sworn peace officer coroner, the judiciary has overturned the law. Specifically in 1979, the California legislature amended California Government Code Section 27491.4(a) that was originally enacted in 1961. That year, the legislature replaced the word "He" with the words "The Coroner" thus the legislative history makes it abundantly clear that it is a duty of the Coroner to authorize tissue retention at autopsy not the independent contractor doctor. The opinion was arbitrary and unforeseen. Furthermore, the Petitioner was denied *de novo* review of the trial court's pleadings. Essentially, the Petitioner was not granted a meaningful hearing.

As a result, the Respondents have been granted monetary judgments in their favor that trigger yet another deprivation of property without a hearing by the State of California. [Reply Petn. App. 1-2]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

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In the Superior Court of the State of California
In and For the County of San Mateo

Isolina Picon, Plaintiff, vs. Peter A. Benson, M.D., County of San Mateo, et al., Defendants.	)	No. CIV 467161 ~~[Proposed]~~ Judgment on Costs in Favor of Defendant Peter A. Benson, M.D. in the Amount of $40,403.88

This Court, having on November 5, 2010, granted defendant Peter A. Benson, M.D.'s Motion for Summary Judgment, and having ordered entry of judgment as rquested in said motion; and

This Court having on November 5, 2010, ordered that defendant Peter A. Benson, M.D. have and

recover from plaintiff Isolina Picon costs and disbursements incurred in the defense of this action pursuant to Code of Civil Procedure §§1032 and 1033.5; and

Defendant Peter A. Benson, M.D., having on November 29, 2010 filed and served his Memorandum of Costs in the amount of $38,725.60 and his Memorandum of Costs on Appeal in the amount of $1,678.28; and

Plaintiff Isolina Picon having not filed or served a motion to tax within the time allotted by California Rules of Court, Rule 3.1700(b)(1);

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Peter A. Benson, M.D. is hereby awarded his recoverable costs in the amount of $40,403.88.

Dated: Apr 5, 2011

John L. Grandsaert
Judge of the
Superior Court